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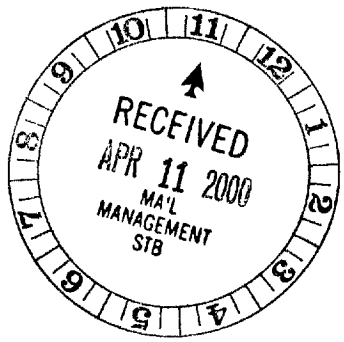
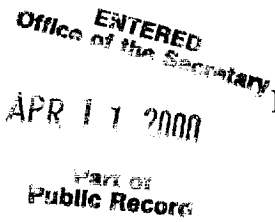


BEFORE THE
SURFACE TRANSPORTATION BOARD



Section 5a Application No. 61 (Sub-No. 6)
National Classification Committee -- Agreement

Opening Comments and Motion of the American Trucking Associations, Inc. in Response to Board Request for Proposals and Comments Decided February 4, 2000, Service Date February 11, 2000

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Dated: April 9, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

Section 5a Application No. 61 (Sub-No. 6)
National Classification Committee -- Agreement

Opening Comments and Motion of the American Trucking Associations, Inc.
in Response to Board Request for Proposals and Comments
Decided February 4, 2000, Service Date February 11, 2000

The American Trucking Associations, Inc. ("ATA") respectfully moves that the Surface Transportation Board ("Board" or "STB") terminate its search for "methodologies for increasing shipper participation in the classification process"[1] and instead approve for an additional five years the National Classification Committee (NCC) Agreement without changes to increase shipper participation. In conducting its search to increase shipper participation, the Board acts in excess of its statutory jurisdiction and not in accordance with the law.

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[1] Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61 (Sub-No. 6), "Summary" (Decided February 4, 2000, Service Date February 11, 2000).

I. Legally-Sufficient Interest of the Commenter

The ATA is a District of Columbia corporation headquartered in Alexandria, Virginia that serves as the trade association for the national trucking industry. Many of the more than 2000 motor carrier members of the ATA are qualified to use, and do use, the NCC's National Motor Freight Classification (NMFC) in their motor carrier operations, including in interstate commerce. The NMFC is more likely to properly accommodate the interests of those motor carriers with no more than the current significant level of shipper participation in the NCC process. Also, the ATA has property interests in the NMFC publication (additions to or changes in which are made under the direction of the NCC), the value of which could be affected by changes in the NCC process. To the extent that the ATA engages in activities with respect to making or carrying out the NCC Agreement approved by the STB, the ATA enjoys immunity for those activities from the antitrust laws.[2] ATA plainly is an interested person for purposes of this proceeding.[3]

II. Motor Freight Classification Assists Economic Competition

The Surface Transportation Board has described motor freight classification as follows:

> Classification, which involves the grouping of commodities with similar transportation characteristics into categories, or "classes," does not involve the actual setting of rates but is a part of the motor carrier ratemaking process. Every commodity that can be shipped by truck is placed into a class with other commodities with similar transportation characteristics, and each class is assigned a number, which increases as transportability becomes more difficult. In order to reach a final price, carriers using the classification typically apply a rate to the class into which the commodity transported falls. Under the current regulatory framework, the rated applied to the class may be determined by a carrier on its own, or it may be set collectively by a motor rate bureau. . . .
>
> The NCC, whose agreement was approved by the ICC [Interstate Commerce Commission] in 1956, is the predominant classification body in the motor carrier industry. After the Motor Carrier Act of 1980 . . .

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[2] 49 U.S.C. §13703(a)(6)(with regard to STB-approved agreement, "the antitrust laws . . . do not apply to parties and other persons with respect to making or carrying out the agreement.")(emphasis added).

[3] Chapters 5 and 7 of Title 5 of the United States Code (Administrative Procedures Act); ATA also plainly has the requisite standing required under Article III of the Constitution in the event judicial review of the Board's decision in this matter. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 145 L. Ed. 2d 610 (2000).

> had substantially reduced Federal motor carrier regulation in order to promote competition, the ICC investigated the activities of the NCC to determine whether they conformed to the aims of the new legislation. The ICC found that continuing the NCC's antitrust exemption was consistent with the new, procompetitive National Transportation Policy, but only if the classification process were modified so that it focused on only four factors related solely to transportability: density, stowability, liability, and difficulty of handling. Other factors that had previously been considerations in the classification process, such as trade conditions, value of service, and competition with other commodities, could no longer be considered because such "economic" factors bore no relation to the relative transportability of each commodity. The ICC reasoned that such economic factors should be more appropriately considered in the ratemaking process itself than in the classification process. . . . [footnotes omitted][4]

The then-Public Works and Transportation Committee of the House of Representatives, in its report on what became the Motor Carrier Act of 1980, stated succinctly the value of the classification process: ". . . the Committee is of the view that the commodity classification system currently in place is a useful tool for shippers, receivers and transporters of regulated freight to all 'know what they are talking about' thereby contributing to an efficient and economic transportation system."[5] Similarly, the Interstate Commerce Commission (ICC) said:

> A uniform classification system, to the extent the industry chooses to use one, meets many of the motor transportation policy goals of 49 U.S.C. 10101(a). Classification can promote efficiency, encourage sound economic conditions in transportation, and allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public.[6]

ATA has previously described the benefits of the freight classification process in Board proceedings on the NCC Agreement:

> The primary procompetitive benefit of the freight Classification is the beneficial information concerning the transportability of general commodities it provides for the sellers and purchasers of transportation services. A uniform classification system for commodities makes it considerably easier for a shipper to compare the rates and service options of various carriers for similar classes of commodities. The Classification facilitates competition between motor carriers by easing the task of rate comparison of shippers. Because a uniform classification system enables shippers to compare the prices and service

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[4] Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61, "Discussion and Conclusions," Part A (Decided December 10, 1998, Service Date December 18, 1998).

[5] Committee on Public Works and Transportation, Report to Accompany H.R. 6418, House Report No. 96-1069 (June 3, 1980), p. 28, 1980 U.S. Code Cong. & Ad. News 2283, 2311.

[6] Interstate Commerce Commission, Section 5a Application No. 61, National Classification Committee -- Agreement (Decided May 7, 1987). The current counterpart to former 49 U.S.C. §10101(a) referenced in the ICC decision is now contained in Section 13101 of Title 49.

> options of motor carriers more easily, it enables shippers to pay lower actual rates than they would otherwise pay if no uniform classification existed.[7]

As the views of the above-quoted congressional committee, the ICC, and the ATA reflect, the NCC Agreement process is consistent with robust economic competition.

III. Section 13703 of Title 49 Does Not Delegate Authority to the Board to Determine Whether Antitrust Immunity is Merited

The Board was off on the wrong foot from the very start of this proceeding, because it misconstrued Section 13703 of Title 49.[8] In the Board order commencing the proceeding, the Board stated: "Under 49 U.S.C. 13703, we have the authority to immunize approved motor carrier bureau agreements from the antitrust laws."[9] But Section 13703 does not delegate to the Board "authority to immunize;" Section 13703 itself directly confers antitrust immunity when the Board makes specific determinations set forth in the statute. There is an enormous difference between Congress by law directly conferring immunity in a given set of circumstances and Congress delegating to the Board the "authority to immunize." The former is automatic by operation of law, but the latter could be withheld even if all other standards in the relevant statute were satisfied.

A. Board's Role is Limited by Statute: Public Interest and Reasonable Conditions to Implement Statutory Transportation Policy

Paragraph 13703(a)(1) of Title 49 grants to "a motor carrier providing transportation or service subject to jurisdiction under chapter 135" authority to "enter into an agreement with one

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[7] Comments of the American Trucking Associations, Inc., Before the Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61 (January 29, 1998), Part IV. A.

[8] 49 U.S.C. §13703 (recently amended by Section 227 of the Motor Carrier Safety Improvement Act of 1999 (Public Law 106-159)).

[9] Surface Transportation Board, National Classification Committee -- Agreements, Section 51 Application No. 61, "Supplementary Information" (Decided November 5, 1997, Service Date November 13, 1997).

or more such carriers to establish . . . (C) classifications . . . or (H) procedures for joint consideration, initiation, or establishment of matters described in subparagraphs (A) through (G)." This statutory grant of authority to motor carriers (not motor carriers and shippers) under paragraph 13703(a)(1) can operate by itself, independent of the other provisions of Section 13703; motor carriers may, but need not, submit such agreements for the approval of the Board under the succeeding provisions of Section 13703. However, Section 13703 creates a significant incentive for motor carriers to submit such agreements for Board approval, because subsection 13703(a)(6) confers immunity from the antitrust laws on "parties and other persons with respect to making or carrying out the agreement . . ." if the agreement has received Board approval under the applicable statutory standards.

The applicable statutory standards for Board approval of a submitted agreement are: (1) the submitted agreement "may be approved by the Board only if it finds that such agreement is in the public interest;" and (2) the Board "may require compliance with reasonable conditions consistent with this part to assure that the agreement furthers the transportation policy set forth in section 13101." If the Board determines that those two standards are met -- (1) Board finds public interest and (2) Board may impose reasonable conditions to further the statutory transportation policy -- then the statute itself confers the antitrust immunity, with no further ifs, ands or buts. However, the Board apparently reads Section 13703 as if there were three standards, not two: (1) Board finds public interest, (2) Board may impose reasonable conditions to further statutory transportation policy, and (3) Board decides whether agreement merits antitrust immunity.

The Board, apparently assuming that it may include its own preferences regarding antitrust matters in its "public interest" calculus, has essentially rewritten the statute to read as if Congress had delegated to the Board authority to decide what merits antitrust immunity and what does not.

However broad may be the latitude afforded the Board under a "public interest" standard, that latitude cannot extend to the Board exercising discretion to grant or withhold antitrust immunity, for the statute itself grants that immunity without vesting any discretion with regard to immunity in the Board. Under Section 13703, the public interest and reasonable conditions are separate from the grant of immunity, and the latter is automatic when the former exist.

Like the duty to determine whether an agreement is in the "public interest," the statutory grant to the Board of authority to impose "reasonable conditions" to ensure that an agreement submitted under Section 13703 "furthers the transportation policy set forth in section 13101" affords no basis for the Board to impose on the motor carrier industry the Board's own views of what merits antitrust immunity. Indeed, Section 13101 of Title 49 makes it the policy of the United States to "encourage sound economic conditions in transportation, including sound economic conditions among carriers" and to "encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competition practices." The Board's unilateral policy of increasing the role of shippers in the classification agreement process is not consistent with the statutory requirement that the Board must ensure that the agreements further "sound economic conditions among carriers" and protect against "destructive competition practices."

As is clear from the plain language of paragraph 13703(a)(6), Congress has already made the decision in enacting paragraph 13703(a)(6) to confer antitrust immunity automatically when the two requirements are met -- public interest and reasonable conditions to ensure the statutory transportation policy. Congress has not given the Board authority or discretion to simply decide that antitrust immunity is not merited (or to simply decide that it will "withhold" such immunity until carriers behave as the Board wishes them to behave).

B. Board Exceeds Its Statutory Authority with Shipper Participation Mandates

The Board has made three decisions under Section 13703 of Title 49 in this proceeding regarding the role of shippers in the motor carrier freight classification process. The decisions are based on an error of law: the Board's misconstruction of Section 13703 as if it delegated to the Board the authority to decide the merits or demerits of granting antitrust immunity.

In a decision of December 10, 1998,[10] the Board stated:

> We find that renewal of the bureau agreement of the National Classification Committee (NCC), with some changes, and with the exception of its Uniform Bill of Lading, would not be contrary to the public interest. Thus, we establish a framework under which we will develop more effective procedures for shipper participation consistent with this decision, which will take effect after one year absent a clear expression from Congress to the contrary.

However, the Board further stated:

> . . . But while we would not expect to adopt a requirement that shippers be given full voting rights, we do agree with the shippers that the current system is far too one-sided; that the NCC agreement should provide for shipper input from the outset to the completion of the process; and that the entire classification process should be fully open to the public, and all written reports and recommendations must be available to any interested person. Yet, the shippers have not suggested specifically how the existing NCC agreement should be amended to achieve these public benefits. Therefore, if we were to rule now on whether extension of NCC's immunity would be contrary to the public interest, we would first take further public input as to how the NCC agreement ought to be modified to remedy these concerns. [emphasis added]

In a separate portion of its decision, dealing with uniform bills of lading, the Board stated: "We see no need to extend antitrust immunity to developing a uniform bill of lading, and no reason why that activity should be covered by a collective ratemaking agreement." [emphasis added][11]

The Board's own words -- "whether extension of NCC's immunity would be contrary to the public interest" and "[w]e see no need to extend antitrust immunity to developing a uniform bill

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[10] Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61, (Decided December 10, 1998, Service Date December 18, 1998).

[11] The Board subsequently reversed its decision on the uniform bill of lading issue. Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61, (Decided February 9, 2000, Service Date February 11, 2000).

of lading" -- shows that the Board misconstrues Section 13703 as if it delegated to the Board authority to decide the merits of granting or not granting antitrust immunity. The portion of the Board's decision of February 9, 2000[12] dealing with increased shipper participation in the classification process reflects the same misconstruction of the statute:

> Citing *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985) (a case that did not involve a regulated entity seeking antitrust immunity), ATA also argues (petition at 6) that procedural fairness is not required for standard setting organizations like NCC. Given the substantial rate implications associated with NCC's activities, however, we do not believe that it would be in the public interest to continue to grant immunity from the antitrust laws without regard to the fairness of the procedures under which the organization operates.

Again, the Board misconstrued Section 13703 as if it delegated to the Board authority to decide whether an agreement does or does not merit immunity from the antitrust laws.[13]

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[12] Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61, (Decided February 9, 2000, Service Date February 11, 2000), footnote 5. Similarly, in footnote 13 of the decision, the Board speaks of "terminating antitrust immunity," "activities as to which we may deny antitrust immunity," and "continuing, modifying or discontinuing antitrust immunity" as if antitrust immunity were in the gift of the Board to bestow, rather than a statutory result of the Board's public interest determination. The ATA noted that the Board also stated in this decision: "At the outset, we must say that we are surprised at the unwillingness of the trucking interests even to entertain suggestions for improving the classification process. Our NCC Decision, after all, did not even propose any particular condition on NCC to improve shipper participation. Rather, it simply found that, while the process gives shippers some rights, it ought to be improved and opened up further. To object categorically to any inquiry into the process, without even knowing what proposals might be made, reflects a closed mind and in fact confirms our initial view that some changes may be appropriate." Recognizing that the Board has quasi-judicial functions, the ATA trusts that the Board's references to "unwillingness . . . to entertain" and "reflects a closed mind" were not intended to imply that the Board expects a participant in Board proceedings to forego zealous advocacy of its interests within the bounds of the law.

[13] The Board has taken the position that "[t]he Board's determination to initiate a proceeding to provide for more effective shipper participation into the classification process was essentially ratified by Congress in the 1999 motor carrier legislation," referring to the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Public Law 106-159). Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61, (Decided February 9, 2000, Service Date February 11, 2000). The Board cited in support of this extraordinary proposition that: (1) the Board published in December 1998 its decision that the classification process needed more shipper participation, (2) the "leadership of both Parties of our authorizing Committee of the House of Representatives suggested that Congress would be reviewing motor carrier rate bureau issues during 1999, and asked the Board not to proceed," (3) "the Board issued its decisions, telling Congress how it intended to proceed absent a directive to the contrary," and (4) Congress adopted the MCSIA in late 1999 addressing a number of issues the Board had raised in its decisions, but "Congress by its action did not stand in the way of the Board's going forward with the approach outlined in the 1998 decision and the NCC Decision." Communications between the Board and a handful of Members of one committee in one House of Congress (albeit politically powerful members), and the Board's publication of a decision which essentially says to Congress your-silence-is-consent-if-you-do-not-overturn-us is no substitute for the requirements of the Constitution of the United States for enactment of legislation. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988)("This Court generally is reluctant to draw inferences from Congress' failure to act."); Ex parte Mitsuye Endo, 323 U.S. 283, 304 n. 24 (1944)(agency report of regulations

The Board's decision of February 11, 2000[14] that it "seeks suggested methodologies for increasing shipper participation in the classification process," carries forward the misconstruction:

> The Surface Transportation Board (Board) seeks suggested methodologies for increasing shipper participation in the classification process, as required by the Board's decisions in National Classification Committee -- Agreement, Section 5a Application No. 61 (STB served Dec. 18, 1998, and February 11, 2000).

Thus, all three of the Board's decisions in its effort to force greater shipper participation in the motor carrier classification process suffer the same fatal legal flaw: the Board has misconstrued Section 13703 as if it delegates to the Board authority to grant (or, more to the point, to withhold) antitrust immunity, and the Board has decided that it will use that non-existent authority as leverage over the NCC to force the STB's antitrust policy preference of greater shipper participation in the NCC. But the statute plainly does not give the Board the leverage it purports to exercise. Under Section 13703, antitrust immunity is not the object of the Board's public interest determination -- it is the statutory result of the Board's public interest determination.

Conclusion

Neither the duty imposed on the Board to determine whether the NCC Agreement is "in the public interest," nor the authorization to the Board to impose "reasonable conditions" to ensure

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and procedures to Congress, discussion of same in Congressional hearings, and discussion of same on House floor prior to passage of appropriations bill are insufficient to show enactment of bill ratified the regulations and procedures; to ratify, the bill "must plainly show a purpose to bestow the precise authority which is claimed."); Chen v. Immigration and Naturalization Service, 95 F. 3d 801, 805 (9th Cir. 1996)(". . . [A]ny inference drawn from Congress' failure to act is generally unreliable."); *see*, American Trucking Associations v. Atchison, Topeka, & Santa Fe Railway Co., 387 U.S. 397, 416-17 (1967). Regardless of whether a few, or even more than a few, Members of Congress knew anything about the Board's decisions on the NCC Agreement, the fact remains that neither the MCSIA nor any other law Congress has passed since the Board opened this proceeding has authorized the Board to mandate greater shipper participation in the NCC Classification process. The Board has no such authority and cannot gain it other than by enactment of legislation.

[14] Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61 (Sub-No. 6), "Summary" (Decided February 4, 2000, Service Date February 11, 2000).

that the NCC Agreement furthers the Nation's transportation policy, allows the Board to give the force of law to its homegrown antitrust policy of expanding the role of shippers in the NCC classification process. Congress makes the country's transportation and antitrust laws, and the Board must content itself with executing the laws as Congress has written them.

The Board should terminate its search for methodologies for increasing shipper participation in the classification process and instead approve for an additional five years the National Classification Committee (NCC) Agreement without changes to increase shipper participation. If the Board or shippers believe that a new, larger role for shippers is appropriate, the Board or the shippers must seek legislation from Congress, for only Congress can change the law to say what the Board wishes the law said.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

By Its Counsel: David S. Addington April 9, 2000

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CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all persons listed on the final revised service list in proceeding "Section 5a Application No. 61: National Classification Committee -- Agreement" by first class mail, postage pre-paid.

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